No. 02-542

Supreme Court, U.S.
FILED
NOV 13 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

SHEILA MARTIN, ET AL. and WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arkansas

BRIEF IN OPPOSITION OF RESPONDENTS SHEILA MARTIN, ET AL.

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QUESTION PRESENTED

Petitioners frame the statement of the question presented as follows: Does due process require the adoption and use of objective standards to gauge whether a trial court abused its discretion in approving a proposed class action settlement agreement? However, in their argument, Petitioners suggest that, although the Arkansas Supreme Court adopted the objective standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), the Court misapplied the standards to the facts of this case. Petitioners do not assert that the *Grunin* standards fail to provide due process protections, but argue that the Arkansas Supreme Court misapplied the applicable rule of law to the facts of this case.

Thus, this appeal involves Petitioners' fact-intensive arguments as to why the Arkansas Supreme Court, in analyzing the objective standards set out in *Grunin,* should have ruled in their favor. Respondents, Sheila Martin, et al., submit that the Arkansas Supreme Court's ruling was proper in all respects and respectfully request this Honorable Court to deny the Petition for Writ of Certiorari. This case raises no significant issues of law that warrant this Court's review, presents no conflict of authority, turns on its own facts, and will affect few others besides the litigants.

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STATEMENT OF JURISDICTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari should only be granted for compelling reasons. This Honorable Court should decline the exercise of its jurisdiction because Petitioners have failed to establish any compelling reasons for review of the Arkansas Supreme Court's unanimous, thorough, and well-reasoned opinion, which affirmed the trial court's ruling that the settlement involved herein is fair and reasonable. A petition for a writ of certiorari is rarely granted when, as in the present case, the asserted error consists of an alleged misapplication of a properly-stated rule of law.

STATEMENT OF THE CASE

Petitioners appealed to the Arkansas Supreme Court from the Final Judgment and Order of Dismissal entered August 7, 2001, by the Circuit Court of Craighead County Arkansas approving a class action settlement. **Appendix B 23a.**

Prior to the settlement, Respondents, Westark Financial Consultants of Jonesboro, Inc., et al. ("Westark"), engaged in deferred presentment check-cashing transactions which Respondents, Sheila Martin, et al., alleged violated the Arkansas usury law. **Appendix A 2a.** Westark responded by denying that the fees charged were interest charges covered by the Arkansas usury law. Westark also argued that Respondents, Martin and Spencer, as well as most of the class, had signed mandatory arbitration clauses as well as general releases. **Appendix A 10a.**

Under the terms of the settlement, Westark would deposit $605,000.00 into a settlement pool. $435,000.00 of the amount would be used to purchase Series E bonds totaling $870,000.00 to pay the claims of aggrieved customers at a rate of one-and-one-half times any fees paid by those customers. **Appendix A 3a.** The settlement agreement further provided that Westark would, after the expiration of ninety days, discontinue its operations unless an appellate court were to rule that its service charges were not usurious. **Appendix A 3a.**

The trial court entered an order certifying the class, adopting the settlement, and requiring notice to the class by publication and by individual notices. **Appendix A 3a.** After receiving the notice, Petitioners moved to intervene and challenged the fairness of the settlement. **Appendix A 4a.**

The trial court conducted a fairness hearing to determine the fairness of the settlement. In support of the settlement, Respondents, Martin et al., presented the testimony of Martin herself, as well as the testimony of Chris Lawson, a partner at the law firm of Friday, Eldredge & Clark. **Appendix A 4a.** Westark presented the testimony of Jeff Forsey, its chief executive officer and as custodian of financial documents. **Appendix A 5a.** Petitioners' Statement of the Case and Argument contain numerous factual allegations regarding Forsey's testimony and concerning Westark's financial condition. These statements are not supported by the Arkansas Supreme Court's opinion or by any document contained in the Appendix. As such, with regards to this witness' testimony, Respondents, Martin et al., deny the unsupported factual allegations made by Petitioners with regards to Westark's financial condition and incorporate by reference the

information contained in the Arkansas Supreme Court's opinion concerning the testimony elicited from this witness. **Appendix A 5a.**

At the fairness hearing, not one class member testified in opposition to the settlement, and Petitioners appeared solely through counsel. **Appendix B 24a.** After the hearing, and after receiving extensive briefs from all parties, the trial judge approved the settlement as fair and reasonable. **Appendix B 23a-27a.** Petitioners appealed.

On July 5, 2002, the Arkansas Supreme Court issued its unanimous opinion which upheld the decision of the trial court. **Appendix A 1a-27a.** In this opinion, the Arkansas Supreme Court indicated that Petitioners were requesting the Court to adopt the Eighth Circuit Court of Appeals' standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). **Appendix A 6a.** In its analysis, the Court indicated that it was adopting the *Grunin* factors and analyzing the settlement using those factors. **Appendix A 7a.**

Petitioners now argue that the Arkansas Supreme Court "nominally adopted" the *Grunin* standards. Thus, although the Arkansas Supreme Court adopted the very standards advocated by Petitioners, Petitioners now argue that they were denied their due process rights because they disagree with the Arkansas Supreme Court's analysis of the settlement involved herein using those standards.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court adopted the standards from *Grunin v. Int'l House of Pancakes, supra*, applied that

law to the facts in this case, and concluded that the trial court did not abuse its discretion in approving the class settlement. The court analyzed each issue raised on appeal according to the *Grunin* factors. The Petitioners received adequate due process, and the Arkansas Supreme Court's ruling was proper in all respects. Respondents, Martin et al., respectfully request this Honorable Court to deny the Petition for Writ of Certiorari. This case raises no significant issues of law that warrant this Court's review.

REASONS FOR DENYING THE WRIT

I. THE ARKANSAS SUPREME COURT ADOPTED AND APPLIED THE VERY STANDARDS ADVOCATED BY PETITIONERS

The Petitioners complain that the Arkansas Supreme Court adopted the standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), but proceeded to misinterpret and misapply the standards enunciated in *Grunin*, resulting in a denial of due process. The Petitioners do not assert that the *Grunin* standards fail to provide due process protections, but simply argue that the Arkansas Supreme Court misapplied the facts of this case to an otherwise properly stated rule of law.

II. PETITIONERS RECEIVED ADEQUATE DUE PROCESS OF LAW

The Petitioners received adequate due process of law. Before approving the settlement, the trial court conducted a full fairness hearing and considered all of the evidence presented in favor of the settlement as well as Petitioners' objections. Petitioners did not attend the hearing to testify

in opposition to the settlement. **Appendix B 24a.** However, Petitioners' counsel attended the hearing and cross-examined witnesses. After the hearing, and after receiving extensive briefs from all parties, the trial court approved the settlement as fair and reasonable. **Appendix B 23a-27a.** After this ruling, Petitioners were afforded a full appeal which resulted in a unanimous and thorough analysis of each of Petitioners' arguments. As such, Petitioners have been afforded a wealth of due process in this case.

Additionally, Petitioners misstate the Arkansas Supreme Court's ruling in an attempt to strengthen their arguments. Petitioners argue that the Arkansas Supreme Court "recognized Petitioners had made a 'bona fide' argument that the . . . settlement was not comparable to the potential recovery." This statement is found nowhere in the Arkansas Supreme Court's opinion. Rather, the Arkansas Supreme Court found that Petitioners' had a bona fide argument that Respondents, Martin et al., had a strong argument on the merits of their case against Westark. **Appendix A 10a.** However, despite this finding, the Arkansas Supreme Court also acknowledged that it could not assume "that the class w[ould] prevail and collect all damages claimed." **Appendix A 11a.**

Petitioners also incorrectly argue that the Arkansas Supreme Court "effectively" shifted the burden of proof to Petitioners. The flaw in Petitioners' argument is illustrated in the "Questions Presented" section of Petitioners' Petition in which they acknowledge that the question before the Arkansas Supreme Court was whether the "trial court abused its discretion in approving a proposed class

action settlement agreement." Thus, Petitioners acknowledge that the standard of review applicable to the Arkansas Supreme Court was an abuse of discretion standard.

The Arkansas Supreme Court properly applied an abuse of discretion standard to the evidence in the appellate record and ruled that the trial court had not abused its discretion in approving the settlement. In fact, the Arkansas Supreme Court specifically acknowledged that "it was the trial judge who was in the trenches and lived with this class litigation. He assessed the risk of litigation, the delay in recovery, the amount of recovery claimed versus the settlement that was struck, as well as the other *Grunin* factors, and concluded that the settlement was fair and reasonable." **Appendix A 15a.** The Court further indicated that it would accord deference to the trial court in matters such as the one presented by this case and would not second-guess the decision of the trial court based upon Petitioners' arguments. **Appendix A 15a.** This analysis was proper in all respects.

III. THE CLASS MEMBERS RECEIVED ADEQUATE NOTICE

The notice to potential class members in this action was adequate. The notice of the fairness hearing was mailed to each class member at his or her last known address on May 16, 2001, and the fairness hearing was held on June 1, 2001. **Appendix A 4a.**

In its analysis, the Arkansas Supreme Court noted that courts have approved notices given to a class within a comparable period before the fairness hearing, citing *Grunin v. Int'l House of Pancakes*, *supra*, (holding that notice sent out nineteen days before fairness hearing was

not a violation of due process); *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) (holding that notice sent out twelve days before fairness hearing was not a violation of due process). **Appendix A 20a.**

The Arkansas Supreme Court further held that the notice contained an opt-out provision which advised the class members that they could always choose to opt out of the settlement and had until August 15, 2001, to exercise that right. Class members had almost three months notice of the opt-out deadline. The Court noted that opting out of the settlement would give class members the recourse to pursue their own claims against the particular check-casher businesses with which they were involved. **Appendix A 20a.** The Court also reasoned that Petitioners failed to present any evidence to the trial court that the notice provided to class members hampered their ability to participate in the fairness hearing and, in fact, found the evidence to be to the contrary. **Appendix A 21a.**

The Arkansas Supreme Court also held that the mailing of individual notices to potential class members by standard mail was adequate, as such members of the class certainly had notice of their right to opt out of the class in plenty of time. The Court also found that, although standard mail was utilized in the initial notice, the parties requested return service for undeliverable notices at additional cost which presupposed that the parties re-mailed the notices to transient class members. Additionally, the Court noted that notice of class certification, the proposed settlement, and the opt-out date were supplemented by published notice in the *Arkansas Democrat-Gazette*, a newspaper with statewide circulation on May 21, 2001. Thus, the Court properly concluded that the

notice given comported with minimum standards of due process. **Appendix A 21a.**

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

Because the Arkansas Supreme Court adopted and applied the very standards advocated by Petitioners, this case turns on the facts and not the law. This case does not present a situation in which there is a conflict of authority. Rather, Petitioners ask this court to second-guess the Arkansas Supreme Court's application of a correctly-stated rule of law.

Ultimately, the trial court and the Arkansas Supreme Court were asked to analyze Rule 23 of the Arkansas Rules of Civil Procedure as well as a provision of the Arkansas Constitution. The trial judge provided Petitioners with an opportunity to be heard in full. The trial court considered each argument made by Petitioners and, in its discretion, approved this settlement as fair and reasonable. The Arkansas Supreme Court, using objective standards, thoughtfully analyzed each issue presented by Petitioners and ruled that the trial court had not abused its discretion in approving this settlement.

Petitioners argue that the Arkansas Supreme Court's application of the *Grunin* factors will have a far-reaching effect because other class action settlements will be upheld. Given that the Arkansas Supreme Court adopted the very standards advocated by Petitioners, this argument is unsupported and illogical. To the contrary, the

decision below turns on its own facts and will affect few others besides the litigants.

CONCLUSION

The Arkansas Supreme Court adopted the standards from *Grunin v. Int'l House of Pancakes*, *supra.*, applied that law to the facts in this case, and concluded that the trial court did not abuse its discretion in approving the class settlement. The Court analyzed each issue raised on appeal according to those factors. The Petitioners received adequate due process, and the Arkansas Supreme Court's holding in this case was proper in all respects. For all of the foregoing reasons, Respondents Martin et al. respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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